U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 16 October 2006

CASE NOS.: 2005-LHC-1520
2005-LHC-1521
2005-LHC-1607

OWCP NOS.: 07-172244
07-168046
07-163484

IN THE MATTER OF:

D. H.[1]

Claimant

v.

NORTHROP GRUMMAN SHIP SYSTEMS

Employer

APPEARANCES:

SUE ESTHER DULIN, ESQ.

For The Claimant

PAUL B. HOWELL, ESQ.

For The Employer

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq.,

[1] Pursuant to a policy decision of the U.S. Department of Labor, the Claimant's initials rather than full name are used to limit the impact of the Internet posting of agency adjudicatory decisions for benefit claim programs.

(herein the Act), brought by Claimant against Northrop Grumman Ship Systems (Employer).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on March 24, 2006, in Gulfport, Mississippi. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. In lieu of a formal hearing, Employer offered 46 exhibits, which were admitted into evidence along with the Joint Stipulations of Facts and Law. On May 11, 2006, Counsel for the Regional Solicitor advised that the District Director had no objections to the Joint Stipulations. This decision is based upon a full consideration of the entire record.[2]

Post-hearing briefs were received from Employer and the Regional Solicitor by the due date of June 12, 2006. Based upon the stipulations of Counsel, the evidence introduced, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

The Employer, Claimant and Regional Solicitor agreed to Joint Stipulations (JX-1), which I accept, since I find they are supported by the evidence submitted by the parties. The parties submitted the following stipulations:

1. The parties agree that an Order on the basis of this stipulation shall have the same force and effect as an Order made after a full hearing.

2. That the documents attached to the Stipulations (JX-1) substantiate the stipulation and represent the evidence to be considered by the administrative law judge on the Section 8(f) issue.

3. That the parties waive any further procedural steps before the administrative law judge other than the judge's resolution of the Second Injury Fund issue.

[2] References to exhibits are as follows: Employer's Exhibits: EX-___; and Joint Stipulations of Fact Exhibit: JX-___.

4. That the parties waive any right to challenge or contest the validity of the Order entered into in accordance with this agreement.

5. That the Claimant at all times pertinent hereto was subject to the jurisdiction of the Act, since he was employed as a pipewelder in the construction of naval vessels at Northrop Grumman Ship Systems, Inc., which adjoins the navigable waters of the Pascagoula River and the Gulf of Mexico.

6. That Claimant's first injury occurred on February 22, 2002, when his back popped while bending backwards to weld overhead.

7. That Claimant's average weekly wage for his first injury was $693.00.

8. That Claimant was temporarily and totally disabled as a result of his injury of February 22, 2002, from April 25, 2002 to May 21, 2002 and from June 19, 2002 to July 7, 2002.

9. That Claimant sustained a second injury on January 20, 2003, when he developed bilateral hand problems while operating a burr motor and buckeye which was diagnosed as carpel tunnel syndrome.

10. That Claimant's average weekly wage for his injury of January 20, 2003, was $744.90.

11. That Claimant was temporarily and totally disabled as a result of the injury of January 20, 2003, from September 11, 2003 to January 24, 2004, when he reached maximum medical improvement.

12. That Claimant was permanently and totally disabled as a result of the injury of January 20, 2003, from January 25, 2004, to the present and continuing.

13. That Claimant sustained a third injury on September 1, 2003, due to noise exposure at work.

14. That Claimant sustained a 4.1% binaural hearing loss for which he is entitled to an award of $4,211.52, which has already been paid by Employer.

15. That Employer will remain responsible for Claimant's past and future casually related medical expenses pursuant to Section 7 of the Act.

16. That the parties agree that Counsel for Claimant shall be entitled to a reasonable and necessary attorney's fee which has been the subject of an Order Approving Compromise Attorney Fee dated July 31, 2006.

17. That no penalties or interest are due.

18. That Employer will be entitled to a credit for any compensation heretofore paid for these injuries as against any liability for compensation owed in this matter.

II. ISSUE

The sole unresolved issue presented by the parties is the applicability of the Second Injury Fund and Employer's entitlement to Section 8(f) relief.

III. SUMMARY OF THE EVIDENCE

Background

Claimant filed a claim for compensation on July 23, 2002, alleging a back injury on February 22, 2002, in Case No. 2005-LHC-1607. (EX-8). On March 17, 2005, Employer filed a Petition for Second Injury Fund Relief based on Claimant's back injury. (EX-11).

On April 7, 2005, Claimant filed a claim alleging hand injuries from grinding on a buckeye in Case No. 2005-LHC-1521. On March 21, 2005, Employer filed a Petition for Second Injury Fund Relief based on Claimant's hand injuries. (EX-21).

On April 7, 2005, Claimant also filed a claim for cumulative trauma and hearing loss in Case No. 2005-LHC-1520 which Employer accepted and paid. (EX-24; EX-31).

Claimant

Claimant was deposed by the parties on June 7, 2005. (EX-46). He stated he thought he had a seventh or eighth grade education, but did not finish the seventh grade. He can read and write "fair," and did not complete a GED. (EX-46, pp. 5-6).

He is a certified welder and has no military experience. (EX-46, p. 7).

Claimant was hired by Employer in 1965 and worked various jobs until his last occupation as a pipewelder. (EX-46, pp. 8-11). He injured his back on February 22, 2002, while welding in a squatting position. (EX-46, pp. 14-18). He sustained hand injuries on January 20, 2003, and underwent surgeries to both hands for carpal tunnel syndrome. (EX-46, pp. 23, 25).

He reported to the Employer's "hospital" and received treatment from Drs. Wiggins and McCloskey for his back and hands. (EX-46, pp. 18-29). He was assigned a percentage of disability for his hand injuries and subsequent surgeries, but could not recall any assigned limitations for his back. (EX-46, pp. 29-30). He has not returned to work for Employer since his hand surgeries. (EX-46, p. 31).

Claimant testified that in the past he had two shoulder surgeries, one to each shoulder, and probably had work limitations afterwards, but could not recall. (EX-46, pp. 51-52).

The Medical Evidence

On June 28, 2001, Claimant injured his left shoulder while working for Employer. (EX-35, p. 1). He was examined at the Ingalls Infirmary on June 29, 2001. (EX-35, pp. 2-3). On July 2, 2001, Claimant was evaluated by Dr. Jim K. Hudson for his left shoulder pain. Claimant reported having a previous right shoulder rotator cuff repair. Dr. Hudson's impression was possible rotator cuff rupture and planned to have an MRI scan conducted. (EX-35, p. 8). On July 18, 2001, Dr. Hudson noted the MRI confirmed a rotator cuff tear and advised Claimant to have surgical repair. (EX-35, p. 10).

On July 2, 2001, Claimant chose Dr. Arthur Black as his treating physician for his left shoulder strain. (EX-35, p. 4). On July 26, 2001, Dr. Black examined Claimant for left shoulder pain and recommended an arthroscopy of the left shoulder. (EX-37, pp. 1-2). On August 7, 2001, Dr. Black performed a left shoulder open acromioplasty and rotator cuff repair and took Claimant off all work. (EX-37, pp. 5, 9). On October 22, 2001, Dr. Black instructed Claimant to do no work above his shoulder level. (EX-37, p. 13). On March 11, 2002, Claimant reported he was working his regular job and did not want any work restrictions because he did not need any. Dr. Black assigned

maximum medical improvement (MMI) as of March 11, 2002 with a 15% permanent partial impairment of the left upper extremity and no permanent work restrictions. (EX-37, p. 15).

On Febrary 22, 2002, Claimant reported an injury to his back. Claimant was initially evaluated at Ingalls Infirmary by Dr. Warfield from February 22, 2002 until March 27, 2002, when he was referred for an orthopedic evaluation. (EX-11, pp. 8-9; EX-36).

On April 10, 2002, Dr. Chris Wiggins, an orthopedist, rendered an initial impression that Claimant had "low back pain, suspect lumbar disc herniation," and referred him to physical therapy. (EX-38, pp. 2-3). On April 24, 2002, Dr. Wiggins placed Claimant off work and discontinued therapy and ordered an MRI because of continued back pain. (EX-38, p. 9). An MRI was performed on May 1, 2002, which revealed the T12 disc with moderate bulging, but no herniation, moderate desiccation of all lumbar discs and a moderate central herniation at L5. (EX-38, p. 10). Dr. Wiggins sought and obtained authorization for epidural injections which were performed by Dr. Ricardo Merlos. (EX-38, pp. 11, 13, 16). Following a good response, Dr. Wiggins allowed Claimant to return to work on May 20, 2002. (EX-38, p. 14).

On June 19, 2002, Dr. Wiggins considered referring Claimant to Dr. McCloskey for evaluation of any neurosurgical treatment deemed appropriate, but Claimant became asymptomatic in July 2002, and was allowed to resume regular work. (EX-38, pp. 15, 17).

Dr. McCloskey first treated Claimant on September 2, 2002, and suspected compressive radiculopathy into the right leg with multiple levels of degenerative lumbar disc disease and recommended a lumbar myelogram. (EX-39, pp. 1-2). On September 13, 2002, a lumbar myelogram was performed which disclosed a left paracentral lower left lateral disc protrusion at L5-S1 impinging on the exiting nerve root. (EX-39, pp. 4-5). Dr. McCloskey concluded Claimant was not a surgical candidate but referred him to physical therapy. (EX-39, p. 8).

On December 2, 2002, Claimant returned to Dr. Wiggins with complaints of burning pain into his legs and both hands with numbness and tingling. (EX-38, p. 21). Claimant was continued on regular work, but if symptoms persisted Claimant was to report to Ingalls Infirmary for evaluation of carpal tunnel syndrome. (EX-38, p. 22). On January 13, 2003, Dr. Wiggins

diagnosed Claimant with persistent lumbar disc syndrome. (EX-38, p. 24). On January 20, 2003, Claimant developed bilateral hand problems while operating a grinder on a buckeye. (EX-15).

Based on a referral from Dr. McCloskey, Claimant was evaluated by Dr. Thomas L. Yearwood, a pain management specialist, on February 24, 2004, for his low back pain and right leg pain. (EX-40, pp. 1-4). Dr. Yearwood recommended selective nerve root blocks with epidural steroid and trigger point injections which were subsequently performed on April 29, 2003, June 10, 2003, July 29, 2003, January 8, 2004, May 18, 2004, July 20, 2004, July 23, 2004, August 5, 2004, September 2, 2004, September 30, 2004, October 22, 2004, October 29, 2004, November 19, 2004, January 10, 2005, March 11, 2005, April 4, 2005 and May 2, 2005. (EX-40, pp. 5-12, 14-39, 40-44).

On June 3, 2003, Claimant returned to Dr. McCloskey because of numbness involving his forearm, wrist and lateral three fingers of both hands. (EX-11, p. 29; EX-39, p. 11). Dr. McCloskey's impression was suspected bilateral ulnar neuritis and possible carpal tunnel syndrome with chronic post-traumatic low back syndrome. (EX-11, p. 30; EX-39, p. 12). On June 23, 2003, Dr. Terry J. Millette performed an EMG/NCV exam of Claimant which revealed bilateral right greater than left median nerve lesion with normal EMG. (EX-41, p. 1).

On August 5, 2003, Claimant returned with complaints of back pain that included burning and pain in the right leg. (EX-39, p. 18). On September 11, 2003, Dr. McCloskey performed a left carpal tunnel release on Claimant. (EX-39, p. 24). On October 31, 2003, Dr. McCloskey performed a right carpal tunnel release on Claimant. On December 24, 2003, Claimant underwent an MRI scan of the lumbar spine which revealed a broad based disc bulge resulting in moderately severe spinal stenosis at T12-L1 and a broad based disc bulge with possible extruded disc fragment at L5-S1. (EX-39, p. 44).

On January 24, 2004, Claimant reported being incapacitated with his back and having significant problems with his hands after bilateral carpal tunnel releases. (EX-11, p. 41; EX-39, p. 46). Dr. McCloskey opined that Claimant had reached MMI with respect to his hands with a 5% permanent partial impairment to each hand and MMI for his back with no plans for surgery and a 10% permanent partial impairment to the body as a whole. Further back treatment would be in the form of pain management. Claimant was permanently restricted to "some kind of very

sedentary work," because Claimant was "only able to stand for a short time or walk short distances." (EX-39, p. 47).

On February 19, 2004, a Functional Capacity Evaluation was performed on Claimant by Physical Therapy Solutions which determined that Claimant could work at the sedentary level of work with no squatting, no kneeling, no overhead work. (EX-39, p. 48).

On April 12, 2004, Dr. McCloskey performed a "re-do" of the left carpal tunnel release because of persistent and recurring compression of the median nerve at the wrist. (EX-39, pp. 54, 59). On December 21, 2004, Dr. McCloskey opined that Claimant had reached MMI from the "re-do" surgery and was permanently restricted to sedentary work. He was to continue in pain management with Dr. Yearwood. Dr. McCloskey assigned a 15% permanent partial impairment to the body as a whole based on Claimant's back and hands problems. (EX-39, p. 69).

Dr. Alexander Blevens examined Claimant on August 9, 2004, based on a referral of Dr. McCloskey for bilateral hand pain and stiffness. Dr. Blevens assessed Claimant with carpal tunnel syndrome. (EX-43, pp. 1-3).

On September 29, 2004, Dr. Lee Kesterson evaluated Claimant and agreed that he was at MMI and recommended a FCE which was performed on October 12, 2004. (EX-44, pp. 1-4). It was concluded that Claimant had significant functional deficits but demonstrated the ability to perform some lifting in the sedentary category of work and could sit with fair tolerance. It was recommended that Claimant undergo a work conditioning program. (EX-44, p. 7).

On February 15, 2005, in response to a questionnaire received from F. A. Richard, Employer's claims administrator, Dr. McCloskey confirmed that Claimant's back injury of February 22, 2002 combined with and contributed to the effects of his bilateral carpal tunnel syndrome injury of January 20, 2003 to render him materially and substantially more disabled than he would have been as a result of his bilateral carpal tunnel syndrome alone. He further opined that of the 15% whole body impairment, 5% in attributable to Claimant's hands and 10% to his back. He also noted that Claimant had limitations of "limited very repetitive and strenuous work with hands." (EX-39, p. 73).

On April 2, 2005, Dr. James Wold, Ph.D., evaluated Claimant for hearing loss and determined he had a moderate sensorineural hearing loss in both ears and a binaural impairment of 4.1%. Claimant was a candidate for hearing amplification and it was recommended that he have annual hearing evaluations. (EX-30).

The Vocational Evidence

Tommy Sanders, a Certified Rehabilitation Counselor, evaluated Claimant and prepared a vocational report. (EX-45). Based on Dr. McCloskey's February 15, 2005, opinion Mr. Sanders concluded that the limitation to sedentary work and limited use of both hands severely restricted Claimant's return to work options. (EX-45, p. 2). He noted that Claimant's former work as a pipewelder was considered heavy and strenuous work requiring work in awkward positions within a ship's structure. (EX-45, p. 4).

It was his opinion that when Claimant's lower back problems are combined with his bilateral carpal tunnel syndrome restrictions his "re-employment options drop to nearly non-existent." Vocationally, he agreed with Dr. McCloskey that both injuries have combined to render Claimant more disabled in the competitive labor market. In view of Claimant's lack of education, lighter transferable skills, restriction to sedentary work and limitations in the use of both hands/wrists, it was Mr. Sander's further opinion that few unskilled sedentary jobs might be found for Claimant. Id.

The Contentions of the Parties

Employer, in its brief, argues that Claimant's manifest back injury of February 22, 2002, combined with and contributed to the effects of his carpal tunnel injury of January 20, 2003, to render him materially and substantially more disabled than he would have been as a result of the carpal tunnel injury alone. Thus, Employer should be granted Second Injury Fund Relief against the award of permanent and total disability in this matter.

The District Director, in opposition, contends that Section 8(f) relief is not appropriate because Employer cannot show that Claimant had a pre-existing permanent partial disability manifest to the Employer prior to any work-related injury or that any resulting disability is greater than from the second injury alone. The District Director argues that Employer filed two Section 8(f) Petitions, EX-11 and EX-21, which allege the

pre-existing manifest disability as "bilateral shoulder surgery" that is not apparent from the proffered exhibit in support of either Petition. Since there is no documented evidence of a pre-existing permanent partial disability, there is nothing manifest to Employer. The District Director, in his brief, does not address the Employer's argument that the back condition serves as the pre-existing disability for the carpal tunnel injury.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

It is also noted that the opinion of a treating physician may be entitled to greater weight than the opinion of a non-treating physician under certain circumstances. Black & Decker Disability Plan v. Nord, 538 U.S. 822, 830, 123 S.Ct. 1965, 1970 n. 3 (2003)(in matters under the Act, courts have approved adherence to a rule similar to the Social Security treating physicians rule in which the opinions of treating physicians are accorded special deference)(citing Pietrunti v. Director, OWCP, 119 F.3d 1035 (2d Cir. 1997)(an administrative law judge is bound by the expert opinion of a treating physician as to the existence of a disability "unless contradicted by substantial

evidence to the contrary")); Rivera v. Harris, 623 F.2d 212, 216 (2d Cir. 1980)("opinions of treating physicians are entitled to considerable weight"); Loza v. Apfel, 219 F.3d 378 (5th Cir. 2000)(in a Social Security matter, the opinions of a treating physician were entitled to greater weight than the opinions of non-treating physicians).

Section 8(f) Application

Section 8(f) of the Act provides in pertinent part:

> (f) Injury increasing disability: (1) In any case in which an employee having an existing permanent partial disability suffers [an] injury, the employer shall provide compensation for such disability as is found to be attributable to that injury based upon the average weekly wages of the employee at the time of the injury. If following an injury falling within the provisions of section 8(c)(1)-(20), the employee is totally and permanently disabled, and the disability is found not to be due solely to that injury, the employer shall provide compensation for the applicable period of weeks provided for in that section for the subsequent injury, or for one hundred and four weeks, whichever is greater, **except that, in the case of an injury falling within the provisions of section 8(c)(13), the employer shall provide compensation for the lesser of such periods.**
>
> (2)(A) After cessation of the [foregoing] payments . . . the employee . . . shall be paid the remainder of the compensation that would be due out of the special fund established in section 44 . . . 33 U.S.C. § 908(f).

Section 8(f) shifts liability for permanent partial or permanent total disability from the employer to the Special Fund when the disability is not due solely to the injury which is the subject of the claim. Director, OWCP v. Cargill Inc., 709 F.2d 616, 619 (9th Cir. 1983).

The employer must establish three prerequisites to be entitled to relief under Section 8(f) of the Act: (1) the claimant had a pre-existing permanent partial disability, (2) the pre-existing disability was manifest to the employer, and (3) that the current disability is not due solely to the employment injury. 33 U.S.C. § 908(f); Two "R" Drilling Co.,

Inc. v. Director, OWCP, 894 F.2d 748, 750, 23 BRBS 34 (CRT) (5th Cir. 1990); 33 U.S.C. § 908(f); Director, OWCP v. Campbell Industries, Inc., 678 F.2d 836 (9th Cir. 1982), cert. denied, 459 U.S. 1104 (1983); C&P Telephone Co. v. Director, OWCP, 564 F.2d 503 (D.C. Cir. 1977), rev'g 4 BRBS 23 (1976); Lockhart v. General Dynamics Corp., 20 BRBS 219, 222 (1988). In permanent partial disability cases, an additional requirement must be shown, i.e., that Claimant's disability is materially and substantially greater than that which would have resulted from the new injury alone. 33 U.S.C. § 908(f)(1); Louis Dreyfus Corp. v. Director, OWCP, 125 F.3d 884 (5th Cir. 1997).

An employer may obtain relief under Section 8(f) of the Act where a combination of the claimant's pre-existing disability and his last employment-related injury result in a greater degree of permanent disability than the claimant would have incurred from the last injury alone. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., 676 F.2d 1110 (4th Cir. 1982); Comparsi v. Matson Terminals, Inc., 16 BRBS 429 (1984). Employment related aggravation of a pre-existing disability will suffice as contribution to a disability for purposes of Section 8(f), and the aggravation will be treated as a second injury in such case. Strachan Shipping Company v. Nash, 782 F.2d 513, 516-517, 18 BRBS 45 (CRT) (5th Cir. 1986) (en banc).

Section 8(f) is to be liberally applied in favor of the employer. Maryland Shipbuilding and Drydock Co. V. Director, OWCP, U.S. DOL, 618 F.2d 1082 (4th Cir. 1980); Director, OWCP v. Todd Shipyards Corp., 625 F.2d 317 (9th Cir. 1980), aff'g Ashley v. Todd Shipyards Corp., 10 BRBS 423 (1978). The reason for this liberal application of Section 8(f) is to encourage employers to hire disabled or handicapped individuals. Lawson v. Suwanee Fruit & Steamship Co., 336 U.S. 198 (1949).

"Pre-existing disability" refers to disability in fact and not necessarily disability as recorded for compensation purposes. Id. "Disability" as defined in Section 8(f) is not confined to conditions which cause purely economic loss. C&P Telephone Company, supra. "Disability" includes physically disabling conditions serious enough to motivate a cautious employer to discharge the employee because of a greatly increased risk of employment related accidents and compensation liability. Campbell Industries Inc., supra; Equitable Equipment Co., Inc. v. Hardy, 558 F.2d 1192, 1197-1199 (5th Cir. 1977).

1. Pre-existing permanent partial disability

I find that the record medical evidence which pre-dates Claimant's February 2002 back injury establishes that he suffered a permanent partial disability, a pre-existing 2001 left shoulder injury, which required surgery and an assignment of MMI on March 11, 2002 with a 15% permanent partial impairment rating to the left upper extremity, but no permanent work restrictions.

The pre-existing left shoulder injury serves as a pre-existing permanent partial impairment for purposes of Employer's Section 8(f) Petition filed based on Claimant's February 2002 back injury and I so find.

Moreover, I find that the record evidence supports a showing that the permanent partial disability and permanent work restrictions emanating from Claimant's back injury, plus the permanent left shoulder impairment, serve as pre-existing permanent partial disabilities for purposes of Employer's Section 8(f) Petition filed based on Claimant bilateral hand injuries of January 2003. There is no evidence to the contrary, and Dr. McCloskey was Claimant's treating physician for both the back and hand injuries.

The District Director's sole reliance on "Exhibit B" to the Section 8(f) Petitions is misplaced since the medical evidence of record corroborates and supplements the history provided to Dr. McCloskey regarding the prior right and left shoulder injuries as pre-existing permanent partial disabilities.

Lastly, I find that Claimant's pre-existing shoulder and back injuries resulted in a permanent partial disability such that it would motivate a cautious employer to discharge Claimant because of an increased risk of a work-related accident and compensation liability. Although Claimant was released to return to work with restrictions and the record indicates that Claimant did suffer an economic loss due to the injuries, I find further that the bulge at the T12-L1 and L5-S1 levels are objective evidence of a permanent partial injury.

Accordingly, I find that Employer has met the first requirement for entitlement to Section 8(f) relief.

2. Manifestation to the Employer

The judicially created "manifest" requirement does not mandate actual knowledge of the pre-existing disability. If, prior to the subsequent injury, employer had knowledge of the pre-existing condition, or there were medical records in existence from which the condition was objectively determinable, the manifest requirement will be met. Equitable Equipment Co., supra; Ceres Marine Terminal v. Director, OWCP, 118 F.3d 387, 392 (5th Cir. 1997); See Eymard v. Sons Shipyard v. Smith, 862 F.2d 1220, 1224 (5th Cir. 1989).

The medical records need not indicate the severity or precise nature of the pre-existing condition for it to be manifest. Todd v. Todd Shipyards Corp., 16 BRBS 163, 167-168 (1984). If a diagnosis is unstated, there must be a sufficiently unambiguous, objective, and obvious indication of a disability reflected by the factual information contained in the available medical records at the time of injury. Currie v. Cooper Stevedoring Company, Inc., 23 BRBS 420, 426 (1990). Furthermore, a disability is not "manifest" simply because it was "discoverable" had proper testing been performed. Eymard & Sons Shipyard v. Smith, supra; C.G. Willis, Inc. v. Director, OWCP, 28 BRBS 84, 88 (CRT) (1994). There is not a requirement that the pre-existing condition be manifest at the time of hiring, only that it be manifest at the time of the compensable (subsequent) injury. Director, OWCP v. Cargill, Inc., 709 F.2d 616 (9th Cir. 1983) (en banc).

A review of the medical records submitted that pre-date Claimant's February 22, 2002 back injury reveal that Claimant was diagnosed with left shoulder rotator cuff rupture for which surgery was required. He reported prior right shoulder surgery. I find that these medical records disclose Claimant suffered from a permanent partial disability for which a permanent partial impairment rating was assigned. I further find that such records were available to Employer at the time of his injury. Clearly, Claimant's back injury was manifest to Employer at the time of his bilateral hand injuries since it occurred during his employment with Employer and for which he received initial medical treatment at the Ingalls Infirmary. Thus, I find and conclude that Claimant's pre-existing shoulder

condition was manifest to Employer at the time of his February 2002 back injury and that his back injury was manifest to Employer at the time of his bilateral hand injuries of January 20, 2003.

Accordingly, I find and conclude that Employer has met the second requirement for entitlement to Section 8(f) relief.

3. The total permanent disability is not due solely to the last work-related injury

Section 8(f) will not apply to relieve Employer of liability unless it can be shown that an employee's permanent total disability was not due solely to the most recent work-related injury. Two "R" Drilling Co. v. Director, OWCP, supra. An employer must set forth evidence to show that a claimant's pre-existing permanent disability combines with or contributes to a claimant's current injury resulting in a greater degree of permanent partial or total disability. Id. If a claimant's permanent total disability is a result of his work injury alone, Section 8(f) does not apply. C&P Telephone Co., supra; Picoriello v. Caddell Dry Dock Co., 12 BRBS 84 (1980). Moreover, Section 8(f) does not apply when a claimant's permanent total disability results from the progression of, or is a direct and natural consequence of, a pre-existing disability. Cf. Jacksonville Shipyards, Inc. v. Director, OWCP, 851 F.2d 1314, 1316-1317 (11th Cir. 1988).

Under this third requirement for Section 8(f) relief, it must be determined if Claimant's present disability results from a coalescence or combination of the most recent work-related injury and the prior permanent impairment ratings of record. Furney v. Ingalls Shipbuilding, Litton Industries, Inc., 17 BRBS 99 (1984); Duncanson-Harrelson & Co. v. Director, OWCP, 13 BRBS 308, 313 (1981).

Dr. McCloskey opined that Claimant's February 22, 2002 back injury combined with and contributed to the effects of his bilateral carpal tunnel syndrome injury of January 20, 2003, rendering him materially and substantially more disabled than he would have been as a result of his bilateral carpal tunnel syndrome alone. Specifically, Dr. McCloskey opined that Claimant's current restrictions would be less had he not had a pre-existing back injury. Of the 15% whole body impairment, 5% was attributable to the hand impairment and 10% was attributable to the back impairment. (EX-39, p. 73). Claimant was limited to very sedentary work by his back condition and because of his

bilateral hand numbness and weakness he was unable to perform repetitive manipulation or strenuous work with his hands. There is no medical evidence to the contrary.

Contrary to the District Director's argument in brief, the medical evidence of record establishes a pre-existing permanent partial disability of the left shoulder before the February 22, 2002, back injury and the shoulder and back injuries pre-existed the January 20, 2003 bilateral carpal tunnel syndrome injury. The District Director is correct in noting that both the back and bilateral hand injuries were treated concurrently since Claimant's back injury was conservatively treated by Drs. Wiggins, McCloskey and Yearwood for an extended period of time. The District Director also argues, without explication, that Dr. McCloskey assigned a permanent partial impairment rating for the back and hand injuries on the same day. The medical records clearly evidence the extent of Claimant's injury before the assignment of an impairment rating. Although Claimant continued to work for Employer for a period of time, he did so in pain which was conservatively treated by pain management specialist Yearwood with numerous epidural steroid and trigger point injections.

Furthermore, the vocational evidence of record corroborates the pre-existing back disability combined with and contributed to the bilateral hand injuries to make Claimant more disabled. The vocational expert noted that job placement would be very difficult if only the restrictions imposed by the bilateral hand injuries were considered. However, when combined with the low back restrictions of sedentary work only, Claimant's re-employment options drop to nearly non-existent. In addition, prior to Claimant's January 20, 2003 work-related hand injuries Claimant had returned and was performing his former job position and work activity while being treated for his back condition. However, after the hand injuries he was unable to perform his former work.

Absent evidence to the contrary, I find that Claimant's permanent total disability that occurred after his January 20, 2003 work-related hand injuries is not due solely to the most recent or last work-related injury. I accept Dr. McCloskey's opinion that Claimant's pre-existing low back condition of February 22, 2002, combined with his hand injuries from the January 20, 2003, work-related accident causing him to be unable to return to his former job position as a pipewelder and becoming permanently totally disabled.

Accordingly, I find and conclude that Employer established the three pre-requisites necessary for entitlement to Section 8(f) relief under the Act for Claimant's permanent total disability and is eligible to receive Section 8(f) relief.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer's Petitions for Second Injury Relief are hereby **GRANTED.**

2. Employer shall pay Claimant compensation for temporary total disability as a result of his February 22, 2002 injury from April 25, 2002 to May 21, 2002, and from June 19, 2002 to July 7, 2002, based on Claimant's average weekly wage of $693.00, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

3. Employer shall pay Claimant compensation for temporary total disability as a result of his January 20, 2003 injury from September 11, 2003 to January 24, 2004, when he reached maximum medical improvement, based on Claimant's average weekly wage of $744.90, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

4. Employer shall pay Claimant compensation for permanent total disability as a result of his January 20, 2003 injury, from January 25, 2004, to present and continuing thereafter for a period of 104 weeks based on Claimant's average weekly wage of $744.90, in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C. § 908(a).

5. After the cessation of payments by Employer, continuing benefits shall be paid pursuant to the provisions of Section 8(f) of the Act from the Special Fund established in Section 44 of the Act until further notice. 33 U.S.C. § 908(f).

6. Employer shall pay Claimant compensation for permanent partial disability in accordance with Section 8(c)(13) of the Act, based on a 4.1% binaural hearing loss at a compensation rate of two-thirds of Claimant's average weekly wage of $770.40 or a compensation rate of $513.60. 33 U.S.C. § 908(c)(13).

7. Employer shall pay to Claimant the annual compensation benefits increase pursuant to Section 10(f) of the Act effective October 1, 2004, for the applicable period of permanent total disability.

8. Employer shall pay all reasonable, appropriate and necessary medical and audiological expenses arising from Claimant's February 22, 2002 work injury, his January 20, 2003 work injury and his September 1, 2004 hearing loss injury while employed by Employer pursuant to the provisions of Section 7 of the Act.

9. Employer shall receive credit for all compensation heretofore paid, as and when paid.

10. All computations of benefits and other calculations which may be provided for in this Order are subject to verification and adjustment by the District Director.

ORDERED this 16th day of October, 2006, at Covington, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge